Supreme Court, U.S.
FILED
AUG 2 1995
CLERK

(2)

No. 94-1981

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROLAND C. BRASWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DANIEL S. GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

1300

QUESTION PRESENTED

Whether the prosecutor's improper comment before the grand jury required petitioner's acquittal of the perjury charges against him.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	4, 5, 6, 7, 9
United States v. *Burns*, 990 F.2d 1426 (4th Cir.), cert. denied, 113 S. Ct. 2949 (1993)	8
United States v. *Hasting*, 461 U.S. 499 (1983)	8, 9
United States v. *Mechanik*, 475 U.S. 66 (1986)	4, 6
United States v. *Mills*, 995 F.2d 480 (4th Cir.), cert. denied, 114 S. Ct. 283 (1993)	8
United States v. *Payner*, 447 U.S. 727 (1980)	9
United States v. *Williams*, 504 U.S. 36 (1992)	8

Statutes and rule:

18 U.S.C. 371	2
18 U.S.C. 1623	2
26 U.S.C. 7203	2
Fed. R. Crim. P. 52(a)	5

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1981

ROLAND C. BRASWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unpublished, but the judgment is noted at 46 F.3d 1127 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1995. A petition for rehearing was denied on March 7, 1995. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and two counts of perjury, in violation of 18 U.S.C. 1623. Petitioner also pleaded guilty to six counts of willful failure to file a tax return, in violation of 26 U.S.C. 7203. The district court granted petitioner's motion for a judgment of acquittal as to the two perjury convictions but denied the motion as to the conspiracy conviction. Petitioner was sentenced to 27 months' imprisonment. On cross-appeals, the court of appeals affirmed the conspiracy conviction, vacated the judgment of acquittal on the two perjury counts, vacated petitioner's sentence, and remanded for resentencing. Pet. App. 1a-9a.

1. Petitioner, an attorney, helped his clients conceal their drug-trafficking profits from the Internal Revenue Service by establishing sham corporations and other means. Pet. App. 2a. A federal grand jury returned an indictment charging him with defrauding the United States by impeding the collection of taxes. *Id.* at 3a. The indictment also charged that he perjured himself before the grand jury during its investigation of the tax fraud. *Ibid.*

The facts surrounding petitioner's grand jury testimony are as follows. Just before petitioner was to testify, the grand jury requested a five-minute break. Gov't C.A. Br. 15. The prosecutor asked the grand jurors not to discuss the proceedings during their break because petitioner might be outside the grand jury room with his attorney. Pet. App. 4a-5a; Gov't C.A. Br. 15. The prosecutor added that peti-

tioner might perjure himself before the grand jury and that the grand jurors should create a "very friendly atmosphere" to make him feel "at ease." Pet. App. 5a; Gov't C.A. Br. 15.

After the grand jury proceedings resumed, petitioner testified about the minute books of a corporation that he had used to launder drug proceeds. Gov't C.A. Br. 14; see also *id.* at 11-12. He repeatedly claimed that he had made entries in the corporate minute books on the dates between 1985 and 1988 specified in the books. Pet. App. 5a; Gov't C.A. Br. 14. Later expert testimony before the grand jury established, however, that the paper on which the entries were written was manufactured in 1991 or 1992. Pet. App. 5a; Gov't C.A. Br. 14-15. Four weeks later, after hearing additional testimony, the grand jury returned the instant indictment, which included eight perjury counts based on petitioner's grand jury testimony. Pet. App. 5a; Gov't C.A. Br. 16.

2. At petitioner's trial, two former clients convicted of drug trafficking testified that he helped them set up shell corporations to launder millions of dollars of drug-trafficking proceeds. Pet. App. 2a; Gov't C.A. Br. 9-12. Other witnesses testified that he lied to the grand jury about recently fabricated corporate records. Pet. App. 2a-3a.

At the end of the government's case, the district court dismissed six of the eight perjury counts against petitioner as duplicative. Pet. App. 3a. The jury convicted him on the two remaining perjury counts and the conspiracy count. *Ibid.*

After the trial, petitioner moved for a judgment of acquittal based on the prosecutor's comments to the

grand jury. Pet. App. 3a.[1] The district court granted the motion with respect to the two perjury convictions, but denied it with respect to the conspiracy conviction. *Id.* at 10a-14a. The court determined that the prosecutor's comment to the grand jury that petitioner might perjure himself was "unnecessary and prejudicial." *Id.* at 14a. It also found that the prosecutor's suggestion that the grand jurors make petitioner feel at ease invited them "to become involved in the prosecution's activities," instead of remaining neutral. *Ibid.* The court did not overturn petitioner's conspiracy conviction, however, because that conviction was supported by "ample evidence." *Ibid.*

3. The court of appeals affirmed the conspiracy conviction and reversed the judgment of acquittal on the perjury counts. Pet. App. 1a-9a.[2] It observed that, under *United States* v. *Mechanik*, 475 U.S. 66 (1986), and *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), "[a]bsent a structural defect, * * * a defendant who seeks to have a conviction vacated or an indictment dismissed because of misconduct before the grand jury must establish[] that the violation substantially influenced the grand jury's decision to indict or [that] there is grave doubt that the decision to indict was free from the substantial influence of such violations." Pet. App. 7a (internal quotation marks omitted). The court held that this case did not

---

[1] The prosecutor's statements to the grand jury were given to petitioner at trial under the Jencks Act (Pet. App. 13a) but were not presented to the petit jury (Gov't C.A. Br. 16).

[2] In a ruling that is not at issue here, the court of appeals also vacated petitioner's sentence on the conspiracy count and remanded for resentencing. Pet. App. 9a.

involve a structural defect, and that "the record does not show that [the prosecutor's] conduct substantially influenced the decision of the grand jury or placed such influence in grave doubt." *Ibid.*

ARGUMENT

1. Petitioner contends that the prosecutor's misconduct before the grand jury was so egregious that it "allows a presumption that [he] was prejudiced." Pet. 11. Thus, according to petitioner, the court of appeals erred both by inquiring whether the misconduct caused actual prejudice and in holding that it did not. Pet. 14. The court of appeals was correct on both scores, however, and its decision does not conflict with any decision of this Court or another court of appeals.

In *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), this Court "h[e]ld that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Id.* at 254. The Court based that holding on Federal Rule of Criminal Procedure 52(a), which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *Bank of Nova Scotia*, 487 U.S. at 255 (quoting Rule 52(a)). The Court also held that, with "isolated exceptions," prejudice is to be determined on a case-by-case basis. 487 U.S. at 256. The exception is for cases "in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 257. The Court cited, as examples of presumptively prejudicial errors, racial and gender discrimination in the selection of grand jurors. *Ibid.*

The court of appeals correctly held that this case does not involve a presumptively prejudicial error in the grand jury proceedings. Pet. App. 7a. Contrary to petitioner's claim (Pet. 10-11), the prosecutor's conduct did not compromise "the structural protections of the grand jury" (*Bank of Nova Scotia*, 487 U.S. at 257). Indeed, the single episode of alleged misconduct involved in this case was far more mild than the pattern of prosecutorial conduct involved in *Bank of Nova Scotia*, which the Court held did not cause a presumptively prejudicial structural defect in the grand jury proceeding. See *id.* at 257, 260. Petitioner argues that, whereas the prosecutorial misconduct in *Bank of Nova Scotia* "concern[ed] matters of evidence *presented to a grand jury*," "the misconduct [in this case] goes beyond the evidence, and *involves the grand jury itself* in the misconduct." Pet. 14. That purported distinction is unsound, however, because petitioner did not show, and the courts below did not find, any misconduct on the part of the grand jurors. Instead, this case differs from *Bank of Nova Scotia* primarily in that the latter case involved numerous and varied instances of prosecutorial misconduct, whereas the present case involves only a single instance. Under *Bank of Nova Scotia*, that isolated incident was not presumptively prejudicial.

The court of appeals was also correct in holding that petitioner did not show that the prosecutor's misconduct caused actual prejudice. The jury verdict against petitioner on the perjury charges "mean[t] not only that there was probable cause to believe that [he was] guilty as charged, but also that [he was] in fact guilty as charged beyond a reasonable doubt." *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986). Petitioner does not dispute that there was ample

evidence at trial to support that verdict. Nor does he even dispute that the evidence before the grand jury established probable cause for the perjury charges. Thus, as the court of appeals concluded, petitioner did not "make the required showing" under *Bank of Nova Scotia*—*i.e.*, that the prosecutor's comments "substantially influenced the decision of the grand jury [to indict petitioner for perjury] or placed such influence in grave doubt." Pet. App. 7a; see *Bank of Nova Scotia*, 487 U.S. at 256.

Petitioner errs in contending that the standard adopted in *Bank of Nova Scotia*, 487 U.S. at 256, for determining actual prejudice was inappropriate here. Pet. 22-23. The Court in *Bank of Nova Scotia* described its standard as appropriate "at least where dismissal is sought for nonconstitutional error." 487 U.S. at 256. The Court did not suggest, however, that a different standard was appropriate for constitutional errors. In any event, the prosecutorial conduct at issue here was no more of constitutional dimension than was the prosecutorial conduct at issue in *Bank of Nova Scotia*. The court of appeals therefore properly applied the *Bank of Nova Scotia* standard, and, as petitioner concedes (Pet. 11), its decision to do so does not conflict with any other court of appeals decision.

2. Petitioner also contends that, even if the Constitution did not compel his acquittal on the perjury counts, that result was a proper exercise of the court's supervisory authority. Pet. 15-25. That contention does not warrant further review.

Petitioner asserts (Pet. 19) that this Court needs "to establish * * * with greater precision" the limits of the courts' supervisory authority over prosecutorial conduct before grand juries. Petitioner

does not contend that there is disagreement regarding those limits among the lower courts. Instead, he claims that review by this Court is necessary to correct "the body of decisions repudiating the power of the courts to maintain any control over the prosecutor's conduct before the grand jury." Pet. 21. Neither of the decisions he cites (Pet. 21-22) constitutes such a repudiation, however; each merely held that the use of supervisory authority was not warranted under the circumstances of that case. See *United States* v. *Mills*, 995 F.2d 480, 487-490 (4th Cir.) (rejecting defendant's claim that indictment should be dismissed because there was no evidence before the grand jury to support charges against him), cert. denied, 114 S. Ct. 283 (1993); *United States* v. *Burns*, 990 F.2d 1426, 1436 (4th Cir.) (refusing to dismiss charge in indictment that court determined was independent of other charges that government had agreed not to bring), cert. denied, 113 S. Ct. 2949 (1993).

Moreover, as the court of appeals observed, the relevant principles are "clear." Pet. App. 6a. In *United States* v. *Williams*, 504 U.S. 36 (1992), the Court made clear that courts generally may not use their supervisory authority "as a means of *prescribing* * * * standards of prosecutorial conduct in the first instance," *id.* at 47; instead, they generally may use that authority only for violations of preexisting legal standards of conduct, such as those prescribed by statute or the Federal Rules of Criminal Procedure, *id.* at 46-47; see also *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). Moreover, *Bank of Nova Scotia* made clear that courts may use their supervisory authority to dismiss criminal charges based on prosecutorial misconduct before the

grand jury only when the misconduct is prejudicial. See 487 U.S. at 254; see also *Hasting*, 461 U.S. at 506; *United States* v. *Payner*, 447 U.S. 727, 736 n.8 (1980).

At bottom, petitioner's argument concerns, not the governing legal principles, but the court of appeals' application of those principles to this case. Thus, petitioner claims that this case "arguably meets" (Pet. 23) the criteria identified in *Bank of Nova Scotia* for an exercise of the court's supervisory authority, because, as a result of the prosecutor's asserted misconduct, the indictment was "not returned by a fair and impartial grand jury" (Pet. 19). The court of appeals disagreed, holding that the prosecutor's conduct did not substantially influence the grand jury's decision to indict. Pet. App. 7a. That factbound disagreement poses no issue worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DANIEL S. GOODMAN
Attorney

AUGUST 1995